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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 891

A. M. COHEN AND WIFE, VERBIE LEE COHEN,
Petitioners,

v.

R. C. BREDEHOEFT, FIRE MARSHAL OF CITY OF HOUSTON; C. R. COOK, FIRE CHIEF OF CITY OF HOUSTON; THE CITY OF HOUSTON; AND CRAWFORD MARTIN, ATTORNEY GENERAL OF THE STATE OF TEXAS, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
This Index	1
Authorities	1
Constitutional Provisions, Statutes, and Ordinances Involved	2
Questions Presented	3
Statement of the Case	4
Brief of the Argument	6
Conclusion	21
Certificate of Service	22
Appendix "A" (City of Houston Ordinance §8941)	23, 29

AUTHORITIES

CASES

	Page
Alpha Enterprises, Inc. v. City of Houston, et al., 411 S.W.2d 417 (Tex. Civ. App. 1967, error ref. n.r.e., cert den., 389 U.S. 1005 [1967])	6, 7
Cady v. City of Detroit, 286 N.W. 805 (Mich. Sup. 1940, app. dism., 309 U.S. 620 [U.S. Sup. 1940])	8
Canon v. City of Dallas, 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref. n.r.e.)	8, 17
Double-Eagle Lubricants, Inc. v. The State of Texas, 248 F. Supp. 515 (U.S.D.C., N.D. Tex. 1965)	20
Dixie Fireworks Co. v. McArthur, 130 S.E.2d 731 (Ga. Sup. 1963)	20, 21
Edward R. Bacon Grain Co. v. City of Chicago, 59 N.E.2d 689 (Ill. App. 1945)	11
Ex Parte Clark, 140 S.W.2d 854 (Tex. Cr. App. 1940)	8
Hill v. Villareal, 383 S.W.2d 463 (Tex. Civ. App. 1964, error ref. n.r.e.)	14

CASES

	Page
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (U.S. Sup. 1960)	10
Kroeger v. Stahl, 148 F. Supp. 403 (U.S.D.C., N.D., N.J. 1957)	14
Louder v. Texas Liquor Control Board, 214 S.W.2d 336 (Tex. Civ. App. 1948, error ref. n.r.e.)	16
Lundy v. Michigan State Prison Board, 181 F.2d 772 (C.C.A. 10, 1950)	7
Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (U.S. Sup. 1939)	9
Panhandle Eastern Pipeline Co. v. Calvert, 347 U.S. 157 (U.S. Sup. 1954)	7
Parker v. City of Fort Worth, 281 S.W.2d 721 (Tex. Civ. App. 1955)	8
People of State of California v. Zook, 336 U.S. 725 (U.S. Sup. 1949)	10
Pierce Oil Corporation v. City of Hope, 248 U.S. 498 (U.S. Sup. 1919)	10, 15
Rice v. Continental Casualty Co., 153 F.2d 964 (C.C.A. 5, 1946)	7
Robertson v. People of State of California, 328 U.S. 440 (U.S. Sup. 1946)	19
Stoughton v. City of Fort Worth, 277 S.W.2d 150, (Tex. Civ. App. 1955)	8
Treadgill v. State, 275 S.W.2d 658 (Tex. Cr. App. 1954)	7, 8
Van Oster v. State of Kansas, 272 U.S. 465 (U.S. Sup. 1926)	17
U.S. v. One 1961 Cadillac Hardtop Automobile, etc., 207 F. Supp. 693 (U.S.D.C., E.D. Tenn. 1962)	17

FEDERAL STATUTES

18 U.S.C.A. 836	2, 18
Federal Child Protection Act of 1966 (Pub. Law 89-756, 98th Cong., S. 3298, Nov. 3, 1966)	18, 19
Federal Hazardous Substances Labeling Act, 15 U.S.C.A. §§1261-1273	19

Page

FEDERAL REGULATIONS

Code of Federal Regulations, Title 49, Ch. 1, #71-79; #73.1 ..... 2, 18, 19

STATE STATUTES

Article 1068, V.A.C.S. 3
Article 1725, V.A.P.C. 15

MUNICIPAL ORDINANCES

City of Houston Ordinance No. 8941 (Appendix "A") 3, 9, 13, 16, 18, 23-29

TEXTS

McQuillin, *Municipal Corporations* (3rd Ed.), Vol. 5, p. 129 (#15.30) 16

MISCELLANEOUS

Lewis M. Killian, National Academy of Sciences, Committee on Disaster Studies, Disaster Study No. 2, Pub. No. 391, *A Study in Response to the Houston, Texas, Fireworks Explosion* 5

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents, R. C. Bredehoeft Fire Marshal of the City of Houston, C. R. Cook, Fire Chief of the City of Houston,[1] and the City of Houston, a municipal corpora-

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1. Subsequent to the trial on the merits, C. R. Cook replaced W. O. Hunter as Fire Chief of the City of Houston, and pursuant to U.S. Sup. Ct. Rule §48(3), 28 U.S.C.A. his name is here substituted.

tion incorporated and acting as such by authority of and as provided by the Constitution and laws of the State of Texas and by virtue of Charters granted by the Legislature of the State of Texas, file this opposition to the Petition for Writ of Certiorari filed by Petitioners to review the Judgment of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

In addition to those submitted by Petitioners, Respondents would add: 18 U.S.C.A. §836.

"Whoever, otherwise than in the course of continuous interstate transportation through any state, transports fireworks into any State, or delivers them for transportation into any State, or attempts so to do, knowing that such fireworks are to be delivered, possessed, stored, transshipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

* * * * *

Code of Federal Regulations, Title 41, Ch. 1, #71-79:

"(a) To promote the uniform enforcement of law and to minimize the dangers of life and property incident to the transportation of explosives and other dangerous articles by common carriers engaged in interstate or foreign commerce, the regulations in Parts 71-79 of this chapter are prescribed to define these artices for transportation purposes, to state the precautions that must be observed by the shipper in preparing them for shipment by rail freight, rail express, rail baggage, highway, or by carrier by water. It is the duty of each such shipper to

make the prescribed regulations effective and to thoroughly instruct employees in relation hereto."

* * * * *

Vernon's Annotated Civil Statutes of Texas, Article §1068;

"The city council shall have power:

"(6) To regulate or prevent and prohibit the use of fireworks and firearms.

"(7) To direct, control or prohibit the keeping and management of houses or any buildings for the storing of gun powder and other combustible, explosive or dangerous materials within the city; to regulate the keeping and conveying of same."

* * * * *

Article IV., Section §15-66 of the Code of Ordinances of the City of Houston, Texas, quoted by Petitioners on page 5 of their Petition for Certiorari, is only one portion (Section §4) of City of Houston Ordinance §8941, the validity of which is attacked by Petitioners here. The entire Ordinance §8941 is set forth in Appendix "A", pages 23 to 29, infra.

QUESTION PRESENTED

I.

There had been a fire and explosion of fireworks in a warehouse within the limits of a populous city, which resulted in the deaths of four persons (including two children) and the injury of ninety-six others, and heavy property damage. Shortly thereafter, and in response to the need it felt was demonstrated by the holocaust, and

in order to prevent the recurrence of such a tragedy, the proper governing body of this city passed an ordinance prohibiting the storage of fireworks within its limits, which ordinance applied equally to intrastate as well as interstate commerce. The validity of the ordinance, as tested by State law, has been upheld by the highest Court of the State.

A) Should the Federal Courts entertain the question of the correctness of the State Court's application of State law?

B) Assuming that the enforcement of the ordinance places a burden on Petitioners' intrastate and interstate traffic in fireworks, and in the light of the background and circumstances presented, in the case at bar:

(1) Would this enforcement exceed the Federally permissible bounds of local police power so as to constitute an unlawful interference with interstate commerce?

(2) Would the enforcement of this ordinance violate Petitioners' rights under the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

The Statement of the Case submitted by Petitioners contains many legal conclusions and mixed conclusions of law and fact with which Respondents cannot agree, hence they submit the following statement:

On June 5, 1953, the Alco Fireworks and Specialty

Company in Houston, Texas, caught fire and blew up,[2] killing four persons (including two children), injuring ninety-six others, as well as heavily damaging and destroying property in this area. (R. 139-141, 145-147, Defendants' Exhibit No. 4). Investigation by the Houston Fire Department determined that the fire and explosion was caused by the fireworks stored in the Alco Company's warehouse (R. 141). Nineteen days after the explosion, and in response thereto, the City of Houston enacted its Ordinance §8941 which, inter alia, prohibits the storage of fireworks within the City of Houston (Appendix "A").

Petitioner, Mr. Alpha M. Cohen, the owner of the Alco Fireworks and Specialty Company, which blew up, incorporated Alpha Enterprises, Inc., and again went into the fireworks business, this time on a tract of land just outside the city limits of Houston, on the Gulf Freeway, a heavily travelled highway between Houston and Galveston. In the latter part of 1965 this land was annexed into the City of Houston, and shortly thereafter, in the early part of 1966, the City requested Petitioners to comply with Ordinance §8941 and remove their property. (R. 24-27). Instead, Petitioners immediately filed suit in

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2. The sound of the explosion was reported to have been heard as far as fifteen miles away. Immediately after the explosion, a mushroom shaped cloud of white smoke rose above the scene, and within about two minutes black smoke began to rise and mix with the white cloud. Sky rockets and flares caused numerous flashes of fire within the cloud, and people nearby could hear the continuous popping of fireworks. Damage was consistently heavy to all but the strongest structures within a radius of almost one-fourth mile from "ground zero". Thirty houses were damaged beyond repair. At least one building a distance of one-half mile received major structural damage. A Sears-Roebuck Co. warehouse received major structural damage to the walls facing the point of the explosion. Many Houston residents thought that an atomic bomb had exploded. Lewis M. Killian, National Academy of Sciences, Committee on Disaster Studies, Disaster Study No. 2, Pub. No. 391, *A Study of Response to the Houston, Texas, Fireworks Explosion.*

the State District Court seeking to enjoin the enforcement of said Ordinance and, in fact, seeking the same relief they here seek in the Federal Courts. After a full trial in the proper State nisi prius court, the injunctive relief Petitioners there sought was denied, and this denial was affirmed by the Court of Civil Appeals for the First Supreme Judicial District of Texas, *Alpha Enterprises, Inc. v. City of Houston, et al.*, 411 S.W.2d 417 (Tex. Civ. App. 1967), and the United States Supreme Court denied a writ of certiorari, 389 U.S. 1005 (1967).

Having run the gamut of the State Courts, losing every step of the way, Petitioners filed this suit in the Federal Courts under the aegis of the Civil Rights Act, 28 U.S. C.A. 1983, alleging that under color of local law, to-wit, City of Houston Ordinance No. 8941, their civil rights under Article I., Section 8, Clause 3, of the United States Constitution, and under the Fourteenth Amendment to that Constitution, were being violated by the enforcement of the aforesaid ordinance prohibiting the storage of fireworks within the city limits and allowing the appropriate city officials to seize any fireworks so stored in violation of law.

The United States District Court for the Southern District of Texas denied the injunctive relief sought, 290 F. Supp. 1001, and the Court of Appeals affirmed the District Court, 402 F.2d 61.

BRIEF OF THE ARGUMENT

I.

Only federal questions need be inquired into in the case at bar, the highest court of Texas having held the ordinance in question valid as tested by state law.

That portion of City of Houston Ordinance No. 8941

under question here has been held constitutional and valid by the Courts of Texas, *Alpha Enterprises, Inc. v. City of Houston,* 411 S.W.2d 417 (Tex. Civ. App. 1967, error ref'd n.r.e., cert. denied 389 U.S. 1005 [1967]).[3] The interpretation of a local or state law by the highest Court of the State[4] is binding upon federal courts unless in contravention of the Constitution of the United States or of some federal statute, *Lundy v. Michigan State Prison Board,* 181 F.2d 772 (C.C.A., 10, 1950). Hence, a reply to that portion of Petitioners' argument that the ordinance violates *state* law can be pretermitted.

II.

If a municipal ordinance is a valid exercise of the police power otherwise (that is, tested by state law), the fact that it incidentally affects interstate commerce does not render it, for that reason, invalid if it has a substantial relation to the public health, safety, morals, and general welfare.

A. *The Ordinance in Question Concerns a Legitimate Area of Local Police Regulation:*

In two specific instances, *Alpha Enterprises v. City of Houston,* 411 S.W.2d 417 (Tex. Civ. App. 1967, error ref'd n.r.e.; cert. denied 389 U.S. 1005 [1967]), and

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3. The Texas Court of Criminal Appeals, in 1954, in *Treadgill v. State,* 275 S.W.2d 658, held another portion thereof valid.

4. Federal Courts are bound by the interpretation intermediate appellate courts place upon local and state laws in the absence of a decision thereon by the highest court of the state. *Rice v. Continental Casuaity Co.,* 153 F.2d 964 (C.C.A. 5, 1946); in this case, however, by the refusal of a writ of error by the Supreme ourt of Texas, with the notation, "no reversible error", the Court of Civil Appeals thus became the highest court of the state in which a decision could be had. *Panhandle Eastern Pipeline Co. v. Calvert,* 347 U.S. 157 (U.S. Sup. 1954).

Treadgill v. State, 275 S.W.2d 658 (Tex. Cr. App. 1955), City of Houston Ordinance No. 8941, under attack here, has been upheld as a valid exercise of the police power. Twice, *Ex parte Clark,* 140 S.W.2d 854 (Tex. Cr. App. 1940), and *Cannon v. City of Dallas,* 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref'd n.r.e.), a similar ordinance of the City of Dallas was upheld as a valid exercise of the police power. Twice, *Stoughton v. City of Fort Worth,* 277 S.W.2d 150 (Tex. Civ. App. 1955), and *Parker v. City of Fort Worth,* 281 S.W.2d 721 (Tex. Civ. App. 1955), a similar ordinance of the city of Fort Worth, was likewise upheld as a valid exercise of the police power.

"Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure on which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency, are within the proper ambit of the police power." *Cady v. City of Detroit,* 286 N.W. 805 (Mich. Sup. 1940, appeal dism. for want of substantial federal question, 309 U.S. 620 [U.S. Sup. 1940]).

It is submitted that the proposition that the regulation of fireworks is within the accepted area of local police regulation cannot be seriously questioned.

B. *There is no Discrimination Against Interstate Commerce as Such:*

The ordinance in question, by its plain language, prohibits the storage of *all* fireworks within the city, making no distinction as to point of origin or destination.

There is no question raised as to discrimination against Interstate Commerce as Interstate Commerce.

C. *The Ordinance only Incidentally Affects Interstate Commerce:*

City of Houston Ordinance No. 8941 prohibits the storage of fireworks within the city limits, and it was this *storage* in violation of ordinance that Respondent-Bredehoeft, sought to prevent. Only insofar as fireworks were carried in and out of such storage was intrastate or interstate commerce involved at all. It is submitted that to follow Petitioners' argument to its logical conclusion, there would be *no* area in which a city could exercise its police power, because Respondents (at this time, at least) can think of no such regulation that would not have *some* effect (differing in degree, of course) on Interstate Commerce. However, the authority to exercise local police power is not granted to municipalities upon the condition that it shall in nowise interfere with Interstate Commerce.

"Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectely involves or burdens interstate commerce." *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (U.S. Sup. 1939). "Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, State action is struck down. If the activity is one of predominately local interest, State action is sustained. More accurately, the question is whether the

State interest is outweighed by a national interest in the unhampered operation of interstate commerce." *People of State of California v. Zook,* 336 U.S. 725 (U.S. Sup. 1949).

Upholding the validity of a municipal ordinance enacted for the purpose of preventing air pollution, the United States Supreme Court, in *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (U.S. Sup. 1960), reaffirmed the fundamental rule of constitutional law on the subject of municipal police regulations vis-a-vis interstate commerce:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. . . ." 362 U.S. 443.

A situation strikingly analogous to the case at bar came before the U.S. Supreme Court in *Pierce Oil Corporation v. City of Hope,* 248 U.S. 498 (U.S. Sup. 1919), turning on the validity of a municipal ordinance forbidding the storage of gasoline, etc. within three hundred feet of any dwelling house. The plaintiff oil company, much like the Petitioners here, contended that the tanks were necessary for its business; that it knew of no available place in the city where the tanks could be put and oil stored without violating the ordinance, and that the enforcement thereof would deprive it of its property without due process of law.

> ". . . A state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States . . . The power is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good . . ." 248 U.S. 498.

On all fours with the situation here, is *Edward R. Bacon Grain Co. v. City of Chicago,* 59 N.E.2d 689 (Ill. App. 1945), where an Illinois intermediate appellate Court was called on to determine the validity of a City of Chicago ordinance regulating grain storage elevators, enacted by the city "as a protection against the extra fire and explosion hazard arising from the operation of a grain elevator due to dust explosions. . . .":

> ". . . The federal control of interstate commerce does not preclude local police regulations covering matters as to which Congress has not acted . . . it has been recognized that there are matters of local concern, the regulation of which unavoidably involve some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress . . . The ordinance before us is a police regulation of strictly a local character, *intended to protect the city, its people, and property from fire and explosion arising out of the maintenance and operation of warehouses.* It applies alike to all warehouse operators, whether engaged in intrastate or interstate commerce. It is not in conflict with the commerce clause of the constitution or any federal legislation or regulation." 59 N.E.2d 693-694. (Emphasis added).

It is submitted that the ordinance in question is intended to protect the citizens of Houston from the disastrous effects of a fireworks warehouse explosion and interstate commerce is only incidentally effected.

D. *There is a Substantial Relation Between the Ordinance and to the Public Health, Safety, Morals, and General Welfare.*

To point out this relationship, Respondents, on cross-examination of Petitioner, Cohen, showed that in June of 1953, he, Cohen, owned a warehouse on Rosine Street, Houston, in which fireworks were stored. (R. 41). Although Respondents' counsel and Mr. Cohen differed on the use of the word "explosion," Mr. Cohen contending that his fireworks did not explode but are *"more for beauty and audible effect than noise"* (R. 49), he answered affirmatively the question, "Well, the warehouse was there in the morning and it wasn't there in the evening, isn't that correct?" (R. 41). Cohen also admitted that "houses all round there were shattered and there were four people killed and about ninety-six injured." (R. 41-42). He stated that shortly thereafter the ordinance complained about was enacted; that he then moved "out on the Gulf Freeway" and thereafter the City of Houston annexed his property (R. 42).

The Respondents introduced the testimony of Mr. Alcus Greer, formerly an Arson Investigator for the Houston Fire Department, who stated that on June 5, 1953 he and another member of the Department were behind the County Jail, ". . . we felt a slight jar and looked in the direction of the Rosine-Waugh Drive area, and we saw at that time a cloud rising from the ground level some

hundred or two hundred feet up. . . . When we arrived there we found there were a large number of structures that had been damaged by the explosion." (R. 139-140). Greer stated that investigation showed that the stored fireworks caused the explosion. (R. 141-142).

Respondents also introduced, as Defendants' Exhibit 4, the Fire Department record of the aforementioned fire and explosion. This record showed that the explosion killed 4 persons and injured 96 others. (R. 145-147). Respondent Bredehoeft testified that on June 5, 1953, he was working at fire station No. 32 "and a three-alarm fire came over the vocal alarm and we responded to an area off of Waugh Drive. We fought fires where buildings were burning all around us. We had three or four on fire at one time. South of us it was still black smoke rising from the area where the explosion had taken place." (R. 130-131).

City of Houston Ordinance No. 8941, forbidding the storage of fireworks within the City was passed by the City Council on June 24, 1953, 19 days after the disastrous explosion and fire.

It is submitted, therefore, the Honorable District Court was correct in holding "Houston's tragic experience with fireworks explosions clearly demonstrated the need and reasonableness of an ordinance of the type now being challenged. . ." (R. 161), and in further holding, "In the case at bar, in contrast, there is more than ample evidence of the dangers presented by the Plaintiffs' fireworks business." (R. 162).

(1) In a balancing of the equities, the public health, safety, morals, and general welfare far outweigh the minimal social, political, or economic value to

> the community resulting from the storage of fireworks within its city limits.

Often, the test of "Balancing the Equities" is used to determine the reasonableness of a statute. The Court in *Kroeger v. Stahl,* 148 F. Supp. 403 ([U.S.D.C.D.N.J., 1957], affirmed 248 F.2d 121 [C.C.A. 3rd, 1957]), holding valid a city ordinance forbidding the erection of a radio transmission tower in a residential area, stated that a consideration to be taken into account is the degree of importance to interstate commerce of the thing regulated, and held that whereas a 1,800 mile, 30 inch, gas pipe line running through fourteen states, at a cost of $240,000,000. and which pipe line was buried below ground and not in the way, might be exempt from some city zoning regulations, a lone radio tower would not have that same justification to a nonconforming use.

This "balancing of the equities" has long been favored by the Courts of Texas, also:

> ". . . In resolving this issue favorably to appellees after *balancing the equities,* the trial court found: appellees are engaged in *an essential and necessary business which promotes the general welfare* and good health of the citizens . . . the operation of the rendering plant is not a nuisance per se; . . . The trial court concluded that *the loss or inconvenience to the individual appellants and the City is not comparable or commensurate with the loss to the appellees and the danger and inconvenience to the public resulting from the granting of the injunction.*" (Emphasis added). *Hill v. Villareal,* 383 S.W.2d 463 (Tex. Civ. App., error ref. n.r.e.).

It is submitted that if there were a "balancing of the

equities" here by a comparison of the danger of storing 50,000 pounds of explosives (R. 44) within thirty-five hundred feet of two schools (R. 63-64) against the non-existent benefit that the fireworks contribute to society, a fireworks warehouse would be left high in the air on the light side of the scales.[5]

III.

A municipal ordinance otherwise valid can be enforced in, and made to apply to, subsequently annexed territory in the same manner as it would be enforceable and applicable to territory in the city at the time the ordinance was enacted.

Annexation of territory into a municipality is more than the mere drawing of lines or coloring of maps. By the fact that territory is annexed, ipso facto, it becomes subject to the local laws (expressed by the City Charter and Ordinances) of the municipality annexing it.

> ". . . and *a business lawful today may in the future, because of the changed situation,* the growth of population or other causes, *become a menace to the public health and welfare, and be required to yield to the public good. . . .*" *Pierce Oil Corporation v. City of Hope,* 248 U.S. 498 (U.S. Sup. 1919).

It has often been held in Texas that a business permissible prior to annexation may be prohibited by the annexing city if it is in conflict with one of its pre-existing

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5. Pertinent to an evaluation of the minuscule benefit fireworks contribute to the economy and general welfare of the State of Texas, it should be noted that the retail sale of fireworks is *prohibited altogether,* except for 29 days out of each year (Art. 1725, V.A.P.C., Sect. 5(D), Petitioners' Petition for Writ of Certiorari, pp. 42-43).

ordinances. *Louder v. Texas Liquor Control Board,* 214 S.W.2d 336 (Tex. Civ. App. 1948, error ref. n.r.e.). This, likewise, is the general rule.[6]

It is submitted, therefore that the test is whether the ordinance in question was valid prior to the annexation, and if it be so, it would be equally effective insofar as newly annexed territory were concerned.

IV.

That portion of City of Houston Ordinance §8941 which allows the seizure and destruction of fireworks stored within the City of Houston in violation of said ordinance does not violate the due process clauses of the Fifth or Fourteenth Amendments to the United States Constitution.

As repeatedly stated herein, the purpose of City of Houston Ordinance §8941 was to prevent the storage of fireworks within the city and to prevent a recurrence of the 1953 holocaust. As an *incident* to the enforcement of the ordinance, *if* the Petitioners did not remove the fireworks, the City stated that it would exercise its rights under the ordinance to seize and destroy them. Petitioners had their option to avoid this loss by taking the explosives out of the populous city.

Assuming the ordinance to be valid otherwise, would it be rendered ineffective by the mere refusal of the Petitioners to remove the fireworks unless paid therefor? Would this impasse prevent the enforcement of the law? Of course not.

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6. McQuillin, *Municipal Corporations* (3d Ed.), Vol. 5, Pg. 129 (#15.30).

It has long been settled that a forfeiture of property used in violation of law is not a denial of due process or an unconstitutional "taking" of property. *Van Oster v. State of Kansas,* 272 U.S. 465 (U.S. Sup. 1926). Indeed, in *United States v. One 1961 Cadillac Hardtop Automobile, etc.,* 207 F. Supp. 693 (U.S.D.C., E.D., Tenn. 1962), an innocent lienholder lost his lien on an automobile used for the transportation of narcotics. Respondents submit that the above cited case would have a much greater claim upon equity and the Fourteenth and Fifth Amendments than the case at bar where the wrongdoer and the owner of the fireworks was one and the same person.

Texas law is the same. In a fireworks storage case, *Cannon v. City of Dallas,* 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref. n.r.e.), it was held:

> "The distinction between cases involving right of eminent domain or where the municipal corporation appropriates property, and where the use of property is restricted or prohibited must be kept in mind. It has been held that police power permits actual destruction of property where public welfare demands. In such cases the city does not affirmatively benefit, but merely prevents or seeks to prevent some type of harm or nuisance to its citizens, and the loss by regulation or destruction does not enrich anyone, as in the case where property is taken for public use and not because it or its use offends. The power to protect by regulation cannot be and is not burdened with the duty of compensating the aggrieved."

It is submitted, therefore, that there has been no present or threatened violation of the Fifth or Fourteenth Amendments to the United States Constitution.

V.

The ordinance in question does not conflict with or violate the Constitution of the United States or any federal law or regulation.

A. *The Congress not having entered the particular field of fireworks regulation covered by the ordinance in question, said ordinance is valid even if it lay within an area of potential federal control.*

The only pertinent federal legislation and regulation anent fireworks are 18 U.S.C.A. 836; the Federal "Child Protection Act of 1966 (Public Law 89-756, 98th Congress, S. 3298, Nov. 3, 1966); and the Code of Federal Regulations, Title 49, Ch. 1, #71-79. 18 U.S.C.A., Sec. 836, provides:

> "Whoever, otherwise than in the course of continuous interstate transportation through any State, transports fireworks into any State, or delivers them for transportation into any State, or attempts so to do, knowing that such fireworks are to be delivered, possessed, stored, transshipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The City of Houston Ordinance §8941 making it unlawful to store fireworks in the City, would not Petitioners' trafficking fireworks in said City be forbidden by Federal law as well?

The Federal Child Protection Act of 1966 amended the Federal Hazardous Substances Labeling Act (15

U.S.C.A. 1261-1273) by adding, as Section 3 thereof, a paragraph banning as hazardous substances, toys or other articles intended for use by children which contain a hazardous substance. Fireworks are exempted from this ban only to the extent that the Secretary of Commerce *"determines that such articles can be adequately labeled to protect the purchasers and users thereof."* This hardly constitutes Congressional promotion of fireworks!

In the Code of Federal Regulations, Title 49, Ch. 1, #71-79, rules governing the shipment and packaging of fireworks in Interstate Commerce are set out. As stated by #73.1 thereof, they are rather limited in scope and intended effect, however:

> "(a) To promote the uniform enforcement of law and to minimize the dangers to life and property incident to the transportation of explosives and other dangerous articles by common carriers engaged in interstate or foreign commerce, the regulations in parts 71-79 of this chapter are prescribed to define these articles for transportation purposes, to state the precautions that must be observed by the shipper in preparing them for shipment by rail freight, rail express, rail baggage, highway, or by carrier by water. It is the duty of each such shipper to make the prescribed regulations effective and to thoroughly instruct employees in relation thereto."

If, by the wildest stretch of the imagination, Interstate Commerce shipping regulations could be classified as a license, "we are far beyond the time when, if ever, 'license' per se was a condemnation of state regulation of interstate business done within the state's borders." *Robertson v. People of State of California,* 328 U.S. 440, 458 (U.S. Sup. 1946).

Very analogous is *Double-Eagle Lubricants, Inc. v. The State of Texas,* 248 F. Supp. 515 (U.S.D.C., N.D. Tex. 1965). A Federal Trade Commission Regulation (16 Code of Federal Regulations, 406.1, et seq.) declared it to be unfair and deceptive practice to fail to disclose on the panel of its container the fact that a lubricating oil has been made from previously used oil. The Court held that this Regulation did not so preempt the field as to prohibit the State of Texas from enforcing its own statute (Art. 1106b, V.A.P.C.) requiring reconditioned lubricating oil to be sold in containers with such disclosure on both the front and back thereof. After reciting, as a predicate, certain fundamental principles of Constitutional law, such as the rule that preemption will not be merely presumed, Judge Hughes held:

> "Since the purpose of the Texas statutes in requiring reconditioned motor oil to be labeled as such is to protect the safety and property of the public and to prevent a deception as to the nature and quality of the product the statute is within the police power of the State. *While the law incidentally affects interstate commerce, it does not discriminate against such a commerce and is reasonable in its requirements.*
> "It is clear that Article 1106(b) Vernon's Annotated Penal Code is a valid exercise of the state's police power, and since the Federal government has not preempted the field to the exclusion of the states, the Texas statute is valid as applied to Double-Eagle." (Emphasis added). 248 F. Supp. 519.

On all fours with the case at bar is *Dixie Fireworks Co. v. McArthur,* 130 S.E.2d 731 (Ga. Sup. 1963) which upheld a Georgia statute prohibiting the storage, transportation, and use of fireworks in that State. That fireworks company attacked the statute as unconstitutiona'

in that it violated the Commerce Clause of the Constitution of the United States and undertook to legislate in a field which has been pre-empted by the Acts of Congress. In rejecting this contention, the Georgia Supreme Court held:

> "2. The 1962 act (Ga. L. 1962, pp. 11-14), restricting the manufacture, sale, and use of fireworks, does not violate the Commerce Clause of the Federal Constitution, nor is it unconstitutional for the reason, as contended, that Congress has preempted the regulation of fireworks by Federal legislation. An exception by Congress of fireworks from the provisions of a criminal statute (18 U.S.C.A. §832) does not preclude legislative enactment by the several States."

CONCLUSION

WHEREFORE, Respondents pray that Petitioners' Petition for Writ of Certiorari be in all things denied.

Submitted this 23 day of January, 1969.

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondents in Opposition to Petitioners' Petition for Writ of Certiorari has been served upon Hon. Presley E. Werlein, Jr., 1350 Esperson Building, Houston, Texas, 77002, and Hon. Charles E. Easterling, 1301 South Coast Building, Houston, Texas 77002, Attorneys of Record for Petitioners; and upon Hon. Tomas F. Keever, Assistant Attorney General, M. & M. Building, Houston, Texas 77002, Attorney of Record for Hon. Crawford Martin, Attorney General of Texas, by placing a copy of same to each of them in the United States Mails, properly addressed, and postage prepaid, this 23 day of January, 1969.

EDWARD A. CAZARES
First Assistant City Attorney
City of Houston, Texas

APPENDIX "A"

[Defendants' Exhibit No. 3]

Ordinance No. 8941

MAYOR'S OFFICE
HOUSTON, TEXAS

June 24, 1953

Honorable City Council of the City of Houston
City Hall

Gentlemen:

In accordance with the provisions of the Charter of the City of Houston, I submit to you the following ordinance with the request that it be passed finally on the date of its introduction. There exists a public emergency requiring such action and I accordingly request that you pass the same if it meets with your approval.

Yours very truly,

/s/ ROY HOFHEINZ
Mayor of the City of Houston

AN ORDINANCE PROHIBITING FIREWORKS; DEFINING THE TERM FIREWORKS; PROVIDING CERTAIN EXCEPTIONS; DECLARING FIREWORKS TO BE A PUBLIC NUISANCE AND AUTHORIZING THEIR SEIZURE AND DESTRUCTION WHERE FOUND IN VIOLATION OF THIS ORDINANCE; AUTHORIZING THE PROSECUTION OF SUITS FOR INJUNCTIVE RELIEF IN AID OF THIS ORDINANCE; PROVIDING PENALTIES FOR VIOLATION

OF THIS ORDINANCE; PROVIDING THAT THIS ORDINANCE SHALL BE APPLICABLE AND IN FORCE WITHIN THE CITY AND SHALL ALSO BE APPLICABLE AND IN FORCE WITHIN THE AREA IMMEDIATELY ADJACENT AND CONTIGUOUS TO THE CITY LIMITS OF THE CITY OF HOUSTON AND EXTENDING FOR A DISTANCE OUTSIDE THE CITY LIMITS FOR A TOTAL OF 5,000 FEET, EXCEPTING HOWEVER ANY PORTION OF SUCH AREA INCLUDED IN ANY OTHER MUNICIPAL CORPORATION; PROVIDING THAT ANY PRESENT LICENSEE SHALL HAVE UNTIL JULY 25, 1953, TO REMOVE FIREWORKS FROM THE JURISDICTION OF THE CITY; PROVIDING THAT IT SHALL NOT BE NECESSARY TO NEGATIVE EXCEPTIONS AND PROSECUTIONS UNDER THIS ORDINANCE; PROVIDING A REPEALING CLAUSE; PROVIDING A SEVERABILITY CLAUSE AND DECLARING AN EMERGENCY.

* * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON:

Section 1. *Definitions.* The term "fireworks" as used in this ordinance shall mean and include any firecrackers, cannon crackers, skyrockets, torpedoes, Roman candles, sparklers, squibs, fire balloons, star shells, gerbs or any other substance in whatever combination by any designated name intended for use in obtaining visible or audible pyrotechnic display and shall include all articles or substances within the commonly accepted meaning of fireworks whether herein specially designated and defined or not.

The term "person" shall mean and include any natural person, association of persons, partnerships, corporations, agents or officer of corporation, and shall also include all warehousemen, common and private carriers, bailees, trustees, receivers, executors and administrators.

Section 2. *Fireworks Prohibited.* It shall be unlawful for any person to manufacture, assemble, store, transport, receive, keep, sell, offer or have in his possession with intent to sell, use, discharge, cause to be discharged, ignite, detonate, fire or otherwise set in action any fireworks of any description.

Section 3. *Exceptions.* This ordinance shall not apply to signal flares and torpedoes of the type and kind commonly used by any railroad and which signal flares and torpedoes are received by and stored or transported by any such railroad for use in railroad operation; nor shall this ordinance apply to any marine signal flare or rocket of the type and kind commonly carried by a vessel at sea for its own use and which signal flares or rockets are transported or received or stored for use only as ship's stores nor shall this ordinance apply to signal flares or rockets for military or police use.

Section 4. *Fireworks a Public Nuisance.* The presence of any fireworks within the jurisdiction of the City of Houston in violation of this ordinance is hereby declared to be a common and public nuisance. The Fire Marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this ordinance and any member of the Fire Prevention Division of the Fire Department of the City of Houston or any police officer of the City of Houston or any other duly constituted peace officer is empowered

to stop the transportation of and detain any fireworks found being transported illegally or to close any building where any fireworks are found stored illegally until the Fire Marshal can be notified in order that the said fireworks may be seized and destroyed in accordance with the terms of this section. Notwithstanding any penal provision of this article, the City Attorney is authorized to file suit on behalf of the City of Houston or the Fire Marshal or both for injunctive relief as may be necessary to prevent unlawful storage, transportation, keeping or use of fireworks within the jurisdiction of the City and to aid the Fire Marshal in the discharge of his duties and to particularly prevent any person from interfering with the seizure and destruction of such fireworks, but it shall not be necessary to obtain any such injunctive relief as a prerequisite to such seizure and destruction. The Fire Marshal or any member of the Fire Prevention Division of the City of Houston is hereby authorized to enter any building where the unlawful presence of fireworks is suspected in order to inspect the same for the presence of such fireworks.

Section 5. *Penalties.* Any person who shall manufacture, assemble, store, transport, receive, keep, sell, offer for sale or have in his possession with intent to sell any fireworks shall be fined Two Hundred Dollars ($200.00) for each offense. If the fireworks be separately wrapped or packaged, the doing or omitting to do any act prohibited by this ordinance shall be a separate offense as to each such separately wrapped or separately packaged fireworks. Each day that a violation of this ordinance shall continue with respect to any package of fireworks shall constitute a separate offense.

Any person who shall use, discharge, cause to be discharged, ignite, detonate, fire or otherwise set in action any fireworks shall be fined not less than Twenty-five dollars ($25.00) nor more than Two Hundred Dollars ($200.00). Any parent or guardian of any minor child below the age of fourteen (14) who permits or allows such minor child to use, discharge, ignite, detonate, fire or otherwise set in action any fireworks shall be fined not less than Twenty-five Dollars ($25.00) nor more than Two Hundred Dollars ($200.00).

Section 6. *Territorial Applicability.* (a) This ordinance shall be applicable and in force throughout the territory of the City of Houston within its corporate limits.

(b) This ordinance shall also be applicable and in force within the area immediately adjacent and contigous to the city limits of the City of Houston and extending for a distance outside the city limits for a total of five thousand (5,000) feet, and it shall be unlawful to do or perform any act in violation of this ordinance within such area of five thousand (5,000) feet outside the city limits; provided that this ordinance shall not apply within any portion of such 5,000 feet area which is contained within the territory of any other municipal corporation.

Section 7. *Temporary Exception for Existing Licensees.* Notwithstanding any other provision of this ordinance, any person who, upon the effective date of this ordinance, holds a permit for storage or sale of fireworks under either the existing Section 616 or Section 620 of the Code of Ordinances of the City of Houston, 1942, shall be permitted to continue such storage of fireworks until 12:01 A.M. July 10, 1953. During such period of time it shall be lawful for such person or any carrier acting for such

person to transport such fireworks from the licensed location to any point outside of the city limits and beyond the five-thousand-foot area defined herein. At 12:01 A.M. on July 25th, 1953, the provisions of this section shall expire and be of no further force and effect.

Section 8. *Not Necessary to Negative Exceptions.* In any prosecution for any violation of this ordinance, it shall not be necessary for the prosecution to negative any proviso or exception but the same may be raised by the defendant by way of defense.

Section 9. *Repealing Clause.* Sections 614 through Section 622, inclusive, of the Code of Ordinances of the City of Houston, 1942, are hereby expressly repealed; but the repeal of such sections shall not abate any pending prosecution for violation of any such sections nor shall the same prevent a prosecution from being commenced for any violation of such section which violation occurred prior to the repeal of the section.

Section 10. *Severability Clause.* If any provision, section, subsection, sentence, clause or phrase of this ordinance, or the application of same to any person or set of circumstances, is for any reason held to be unconstitutional, void or invalid (or for any reason unenforceable), the validity of the remaining portions of this ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council of the City of Houston in adopting this ordinance, that no portion thereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality or invalidity of any other portion, provision, or regulation, and to this end, all provisions of this ordinance are declared to be severable.

Section 11. There exists a public emergency requiring that this ordinance be passed finally on the date of its introduction, and the Mayor having in writing declared the existence of such emergency and requested such passage, this ordinance shall be passed finally on the date of its introduction, this 24th day of June, 1953, and shall take effect immediately upon its passage and approval by the Mayor.

Passed this 24th day of June, A.D. 1953.
Approved this 24th day of June, A.D. 1953.

/s/ Roy Hofheinz
Mayor of the City of Houston

Approved:

/s/ Will Sears
City Attorney